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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 587

THE G. & P. AMUSEMENT COMPANY,
Petitioner,

vs.

REGENT THEATER COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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OPINIONS BELOW.

The opinion of the District Court is reported at 107 F. Supp. 453, and appears in Vol. I of the Record, page 143a. The opinion of the Circuit Court is reported at 216 F. 2d 749, and appears in Vol. I of the Record, page 190a.

JURISDICTION.

The judgment of the Court of Appeals was entered November 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

I.

Is a common buying agent, having the sole and exclusive right to negotiate and contract for the licensing of motion pictures for exhibition in a large number of thea-

ters, most of which are in closed or non-competitive situations, and which is a substantial and generally the largest customer of the motion picture distributors in its area, bereft of unreasonable trade restraining potential and circuit buying power because there is absent a thread of common ownership among such theaters?

II.

May such common buying agent, in concurrent negotiations for the buying and licensing of films with motion picture distributors, join both its many non-competitive or closed situation theaters and its competitive or open situation theater, which is in opposition to an independently owned theater desirous of negotiating for such films, without transgressing the Anti-Trust Act?

STATUTES INVOLVED.

15 U. S. C. Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or

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the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U. S. C. Sec. 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

15 U. S. C. Sec. 7. "Person" defined.

The word "person," or "persons," wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by

the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U. S. C. Sec. 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE.

This is a private anti-trust suit brought under favor of the Federal Anti-Trust Acts. Misuse of buying power by a motion picture buying combine is the predicate for this action. Trial was had to the Court. (Freed, *J.*) Judgment was entered for respondents. The Court of Appeals for the Sixth Circuit affirmed.

Petitioner is a corporation. From October 1, 1937 until March 18, 1950 it was the lessee of a motion picture theater called the Moreland, in Cleveland, Ohio. Inherently competitive with the Moreland was another theater called the Regent, located on the opposite side of the street about 500 feet from the Moreland. Each had approximately 1500 seats. The Regent was operated by respondent Regent Theatre Company, dominated and controlled by respondent Gusdanovic. In November, 1929, less than two years after the Moreland was opened, Gusdanovic organized the Moreland Theater Company, all of the stock

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of which was owned by respondent Regent Theatre Company. The Moreland Theater Company bought the then-existing lease on the Moreland Theater and operated it until October 1, 1937. This was done, said Gusdanovic, "in order to avoid competition" (R. I, p. 127a). Despite asserted losses in the operation of the Moreland, in 1937 Gusdanovic sought to renew the lease on that theater in order, as he again put it, to "avoid the competition and fights" (R. I, p. 97a).

Respondent, Gusdanovic, from 1926 on, has been the chief stockholder and possessor of the chief financial interest in and has dominated and controlled the policies and activities of respondents The Regent Theatre Company, Cranwood Theater Company, Cinema Service Corporation, and East Shore Theater Company, hereinafter called "exhibitor-respondents." He also owned the building which housed the Regent theater.

On February 23, 1938, about five months after petitioner took over operation of the Moreland, respondent Cooperative Theaters of Ohio, Inc., hereinafter called "Cooperative," was incorporated. On March 18, 1938, three weeks after Cooperative was incorporated, exhibitor-respondents became original members of it. Cooperative's purpose clause recites that it was formed:

> "to develop, establish and conduct a centralized system for the booking and distribution of available motion pictures."

Each theater owner which engaged Cooperative and became a member thereof vested in it:

> "the sole and exclusive right to select, negotiate for, bargain for, buy, lease, rent, contract for and book all motion pictures exhibited"

in his respective theater. Respondent Milton A. Mooney is the central figure in the activities of Cooperative.

Respondents Twentieth Century Fox Film Corporation, Loew's Incorporated, Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.), and Universal Film Exchanges Inc. are corporations engaged in the business of licensing and distributing motion picture films. These respondents, hereinafter referred to respectively as "Fox," "Loew's" or "Metro," "Warners" and "Universal," together constitute the "distributor-respondents."

Distributor-respondents are four of the so-called eight major distributing companies. There are comparatively few sources of suitable product. The eight major film companies provide the great bulk of the suitable product. The films of these companies attract a substantial majority of motion picture theater patrons.

The number of features released by these distributors during the damage period with which we are concerned varied from 248 to 399 per season and in recent seasons has not exceeded 300 features per season, including Westerns and re-issues.

Gusdanovic operated the Regent generally on a three-changes per week, double-bill policy. The Moreland felt impelled and tried, in general, to follow suit. In such a situation, good box office product became a commodity in scarce supply. The product of the four distributor-respondents represents pretty much the cream of the product available for exhibition. The lower court, in its opinion, recited that:

> "there was convincing testimony during the trial to the effect that the Moreland could not exist if it were forced to play all the films of the four distributor-defendants on a run subsequent to that of the Regent. There is the focal point of this case. If the Moreland could not exist on a run behind the Regent, so, also,

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must it be true that the Regent could not exist on the same run behind the Moreland" (R. I, p. 151a).

Petitioner's complaint is based on the misuse of buying power generated by the centralization and concentration in Cooperative of the right to buy or lease films for exhibition in a large number of motion picture theaters, the vast majority of which are located in theater-operating-areas where each such theater does not have any competition from any theater showing films on the same run. Such a theater is commonly known as a closed situation. The closed situation is a monopoly situation. The buyer for such a situation possesses the only key which will unlock the run in the given theater-operating-area to a distributor.

A closed situation also arises where there are two inherently competitive theaters in the same theater operating area and each is controlled or owned by the same entity or the buying for each is done by the same buyer (R. I, pp. 52a, 53a). From November 1929 until October 1, 1937, when the Moreland-Regent situation was a closed one, Gusdanovic was able to determine in which theater product should be played. He exhibited the "cream of the product," that distributed by distributor-respondents, in the Regent Theater housed in his own building. He thus held undisputed market control in that theater-operating-area.

The philosophy of Mooney, Cooperative's central figure, and Gusdanovic, was that to the product distributed by distributor-respondents, Gusdanovic and the Regent had acquired a vested right because such product had been exhibited in the Regent theater prior to 1937. This is best demonstrated in Mooney's own language. When defendant "Metro" in 1946 went to competitive bidding between the Moreland and the Regent for its product,

Mooney, in protest, stopped buying any Metro product for any of the Cooperative Theaters (R. I, pp. 89a-92a). He explained his position thus, "Well, I believe that The Regent Theater was the old customer and had been playing product for many years and that they were entitled to all of the Metro product" (R. I, p. 128a). Again in 1946, Schmertz, Fox Branch Manager, in writing to his superior in New York of his difficulties in negotiating with Mooney, reported,

> *"He [Mooney] also told me we dare not sell any of his opposition houses, and that the pictures are his, yet he won't buy them."* (R. I, pp. 39a, 40a.)

When Gusdanovic became an original member of Cooperative, Mooney promised him that he would try to keep for the Regent the product which the Regent had at that time (R. I, p. 50a). He made the same kind of promise to each exhibitor upon joining Cooperative (R. I, p. 50a).

By 1938 Mooney was already an experienced motion picture man. Early in his career he joined respondent Warners. He was branch manager of its Cleveland exchange from some time in the 1920's until January, 1938. He entered the exhibition field in 1924 as the operator of motion picture theaters in Bellefontaine, Ohio. At first he was without competition. In 1930 he was subjected to the large scale and monopoly buying power of the Schine Circuit, later itself the object of a successful government action for violation of the Sherman Act (*Schine Chain Theatres v. United States* (334 U. S. 110, 68 S. Ct. 947, 92 L. Ed. 1245 (1948)). He soon found himself without suitable product and he sold out to Schine at an appreciable loss. Mooney testified for the government in its action against Schine.

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Mooney was thoroughly familiar with large scale and monopoly buying power. He knew, as he put it, that such power could enable a large circuit or aggregation of theaters to "throw a club around and get product in every situation, every deal they wanted" (R. I, p. 7a) and that where a circuit theater had competition, it became important that the circuit get the cream of the product for that theater (R. I, p. 8a).

Mooney early urged Cooperative members to refrain from talking business with film salesmen in order to "build up and strengthen our buying power" (R. I, p. 5a). When one of Cooperative's members violated this admonition, she was compelled to resign.

Cooperative started with twenty-two theaters. By September, 1938 it consisted of twenty-nine theaters. In 1938, the next largest circuit to Cooperative in its exchange area in number of theaters consisted of "13 or 14 theaters." Cooperative grew steadily until, in 1949, it was buying for 141 theaters. The following table shows its year by year growth as of September 1st of each year, until plaintiff went out of business:

1938	29	1944	67
1939	32	1945	76
1940	35	1946	103
1941	42	1947	120
1942	48	1948	136
1943	60	1949	141

From its beginning, there was no circuit or group of theaters in the Cleveland exchange area which exceeded Cooperative in the number of theaters for which such circuit or group bought product. In September, 1949, only six months before petitioner was forced to close the doors of the Moreland, Cooperative was buying product for five

and one-half times as many theaters as the next largest buyer of product for theaters in this exchange area.

Certain of the distributor-respondents kept circuit sales performance records. Cooperative was listed in such records. Circuit sales performance records of respondent Universal show that Cooperative provided Universal with from 20 to 25% of its total circuit billings in this exchange area, more than any other single circuit.

The following table shows the five largest circuit buyers of product from Universal in terms of revenue for each of the periods indicated.

Year-ending	10-30-47	10-30-48	10-29-49	11-1-49 to 3-18-50
Cooperative	$160,614.64	$131,392.50	$153,447.22	$39,089.10
Loew's	9,859.49	94,829.08	108,502.36	11,826.02
Warners	150,554.32	72,135.09	111,113.77	24,714.70
Schine	47,696.56	59,017.11	52,387.62	12,015.93
Shea	26,302.60	30,146.40	34,972.31	11,830.72

The following table, furnished by Warners, lists the five largest buyers of its product in terms of revenue for each of the periods indicated, omitting Warners own circuit.

Year-Ending	9-1-44	9-1-45	8-30-46	8-29-47	8-29-48	8-27-49
Cooperative	$93,270.53	$120,875.81	$136,131.44	$165,765.10	$200,354.17	$217,720.62
R.K.O.	78,188.90	78,711.74	115,185.59	54,439.07	33,835.60	27,233.82
Schine	58,675.92	59,913.92	73,601.76	72,499.17	73,623.29	74,002.74
Associated	56,326.00	71,287.06	68,916.67	41,281.21	61,689.82	111,117.88
Skirball	50,139.66	51,150.80	51,370.25	57,578.39	58,021.49	52,049.33

Cooperative provided Warners with from approximately 17% to 24% of its total billings in this exchange area exclusive of Warners own theaters. This was more revenue than was provided by any other single circuit save its own which operated, in the main, first run theaters in the larger cities.

Cooperative furnished Fox with from approximately 8% of its total film rentals in the 1942-1943 season to approximately 14% of such total beginning with the 1944-1945 season. This was more than any other single circuit

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beginning with the 1944-1945 season. In prior seasons, the Fox revenue from Cooperative was exceeded only by that from Warners for the seasons 1939-1940, 1941-1942 to 1943-1944 (inclusive) and that from Shea in the seasons 1941-1942 and 1942-1943.

Loew's kept no circuit sales performance records. Cooperative, however, provided Loew's with about 12½% of its total business including revenue from its own circuit, whose theaters, for the most part, play first runs in large cities (R. I, p. 92a).

Cooperative, said Zucker (Universal), was "possessed of considerable buying power" (R. I, p. 62a). He testified he

> "never considered selling to the Moreland Theater * * * for the simple reason that I approached Mr. Mooney because of the fact that he represented a potential—an important source of income." (R. I, p. 61a.)

Zucker's superior, Dana, described Cooperative as a "buying combination for a number of theaters * * * important in amount of money."

On December 13, 1938, Mooney told Cooperative members that "we have two theaters in our group who had to contend with opposition, namely the Regent and Lincoln Theaters in Cleveland, which fact is very important as all exchanges need every situation of the remaining number." This meant that more than 90% of the theaters in Cooperative at that time were non-competitive or closed situations.

Branch managers of the several distributor-defendants testified anent the number of non-competitive or closed situations for which Cooperative bought their product. Zucker (Universal) said the majority of such situa-

tions were "non-competitive," that "somewhere about five or six were competitive" (R. I, p. 53a). Wechsler (Warners) said that of the situations for which Mooney bought Warner product, ten or twelve were "competitive," that the "great majority" of the situations for which Cooperative buys are "non competitive" (R. I, p. 64a). Sogg (Loew's) testified that the "majority" of situations for which Cooperative bought Loew's product were "non-competitive," that, for instance, in the year 1946-47, "about 15% were competitive" (R. I, p. 82a). Schmertz (Fox) said that a number of the Cooperative Theaters were "closed situations" (R. I, p. 25a).

The rentals at which pictures are sold for particular theaters fall generally into price levels corresponding to the likely box office appeal of the picture. These price levels are called "brackets," "allocations" or "classifications" and generally are determined for each theater at the beginning of the season. The number of brackets for one theater may differ from that of another theater, but generally speaking, brackets are more or less similarly designated by the particular distributor. Brackets are identified either by number or letter.

Negotiations generally revolve about a form called a deal sheet. The name and location of each theater in the Cooperative Circuit, arranged in alphabetical order, appears on the left hand side of this form. Across the top are spaces for insertion of the names of the pictures. Spaces or boxes are provided for the insertion of prices.

The pattern of negotiating a deal with Mooney was generally the same for all defendant-distributors whether the contracts signed were individual contracts for each theater or a contract for the exhibition of a number of pictures in many theaters. No distinction is made on the

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deal sheets between open and closed situations. For example, Zucker (Universal) always employed a deal sheet such as has been heretofore described. His practice was to fill out the entire deal sheet in advance of his visit to Mr. Mooney (R. I, pp. 54a-55a). Subject to minor exceptions occasioned by conditions peculiar to a particular situation at the moment, or the nature of the picture with relation to a particular situation, negotiations with Mooney revolved about the allocation into which the particular picture had been put (R. I, pp. 55a-56a).

Pictures often were sold to Cooperative on the same over-all basis as a picture previously exhibited. Mere mention of the total amount involved in a deal will frequently permit a contract clerk to set up the allocation price opposite each theater in the deal, "because," as Lapidus, Eastern sales manager for Warners put it, "that particular amount represents a certain allocation" (R. I, p. 136a).

When the deal sheet is filled out with prices representing brackets mutually agreed upon between the branch manager or his superior and Mooney, acting for Cooperative, a contract or contracts are drawn up and submitted to New York for approval. The deal is subject to New York approval. Sales executives in New York are kept apprised of developments and before the deal is finally accepted, the entire projected deal with Cooperative is presented to such sales executive. Sometimes the deal sheets are sent to New York to show "how the deal was set up before it was accepted by Mooney" (R. I, p. 70a).

Whatever difficulties arose to block a projected deal for the Cooperative Circuit, no matter how unreasonable or obstinate Mooney became, howsoever long consummation of the deal was delayed, there was never any effort by the distributor to sell the picture to the petitioner in the Moreland-Regent situation.

From 1938 until virtually 1947, save for few isolated instances, petitioner was deprived of the product of all four distributor-defendants, though it sought continually the opportunity to negotiate for such product. It was not until virtually the beginning of 1947 that the petitioner was accorded an opportunity to bid for Metro product. Before Metro went to bidding in the Moreland-Regent situation, its branch manager in Cleveland was asked by his home office to write up a specific comparison of the two theaters as of that time. He recorded his observations and his conclusions. He then wrote:

> "The appointments of both theaters are good and both properties are kept in good condition."
>
> * * *
>
> "Our business dealings with both of these accounts have been very good and they have always fulfilled their obligations." (R. I, p. 84a.)

On December 27, 1946 after Metro went to bidding in the Moreland-Regent situation, Mooney wrote to Metro:

> "If it is Metro's policy to permit the theatres to pay exorbitant prices in order to build up the house for sale, we cannot compete. As you know, this house has been for sale for many years and if other companies join Metro in auctioning off their pictures between the Moreland and Regent Theatres, he naturally will be able to get a high price for this theatre." (Pl. Ex. 15.)

The crucial finding of fact by the Trial Court from which the judgment entered necessarily followed, reads:

> "Neither Mooney nor Cooperative had or exercised or attempted to exercise monopoly power in the negotiation for or licensing of films for the Regent from the distributor-defendants." (Finding of Fact No. 85, R. I, 180a.)

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Patently, if neither Mooney nor Cooperative had or exercised or attempted to exercise monopoly power and lacked unreasonable trade restraining potential, there could be no transgression of the Anti-Trust Act as alleged by petitioner.

The Trial Court's reasoning is found in the following language in its opinion (R. I, pp. 153a-156a):

> "While it is true that Cooperative represented a considerable number of exhibitors who comprised the local film market, that fact does not in and of itself establish that Cooperative actually possessed the trade restraining potential attributed to it, nor that Mooney was, thus, enabled to 'throw his weight around' to the extent necessary to cause the distributor-defendants to grant him a preferential right-of-way in local film traffic. There is nothing inherently unlawful in the acquisition and retention of a great volume of purchasing power. It is only when that power is used in such a manner as to further an unlawful restraint of trade that the yielder of the power runs afoul of the Sherman Act. *United States v. Griffith, supra.* Therefore, in the absence of oppressive or coercive exercise of Cooperative's *admitted buying potential,** the distributor-defendants were perfectly free to exercise their general right of customer selection with respect to the Regent or any other theater similarly situated, whether or not the theater ultimately selected was represented by a film purchasing agent.
>
> * * * * *
>
> The evidence here does not substantiate the contention that Cooperative used its representation of noncompetitive theaters to exact the preference of the Regent over the Moreland, despite the fact that Mooney often carried on negotiations with the distributor-defendants for all of Cooperative's customer

* Emphasis added throughout unless otherwise noted.

theaters at one time. The mere representation by Cooperative of both competitive and noncompetitive clients, in a single negotiation, does not *per se* violate the mandate of 'picture by picture' and 'theater by theater' dealing.

* * * * *

Compelling logic, in this Court's view, directly refutes the plaintiff's contention that Mooney used his closed situations as a lever in negotiating for films for the Regent in preference over the Moreland. It is to be seriously doubted that an individual theater owner in a noncompetitive situation would suffer his position to be used in a manner, which may work to his detriment, as an instrument for obtaining the preferential treatment of an exhibitor with whom he had no particular connection other than the fact that they were both represented by Cooperative. To the contrary, it is more likely that he should object vigorously to such treatment, even to the point of refusing to purchase the services of Cooperative in the future."

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The lower courts in this case have held that a common buying agent of the nature with which we are here concerned has no monopoly power and no trade restraining potential; that though possessed of a "great volume of purchasing power," though it "often carried on negotiations with the distributor-defendants for all of (its) customer theaters at one time * * * in a single negotiation * * *" joining its many non-competitive situations with its competitive situation in negotiation for product, such conduct cannot run afoul of the Anti-Trust Act.

Such views therefore hold that a buying combine composed of theaters without common ownership can do with immunity what the United States Supreme Court

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has held a buying combine with common ownership cannot do without running afoul of the Anti-Trust Act. *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944); *United States v. Griffith, et al.*, 334 U. S. 110 (1948); *Schine Chain Theaters v. United States*, 334 U. S. 110 (1948); *United States v. Paramount, et al.*, 334 U. S. 131 (1948). Is the mere absence of common ownership a valid and sufficient ground for such immunity? Petitioner submits that it is clear and implicit in the pronouncements of this Court that no such ground is valid.

In *Paramount*, this Court was concerned with discriminatory practices in the distribution of feature motion pictures in violation of the Federal Anti-Trust Act, pertaining to circuits of theaters both affiliated and unaffiliated with the producers and distributors.

A circuit, as employed in the *Paramount* case, is defined in the complaint and approvingly referred to by the U. S. Supreme Court as a "group of more than five theatres controlled by the same person or *a group of more than five theatres which combine through a common agent in licensing films.*" *U. S. vs. Paramount Theatres Inc., et al.*, 334 U. S. 131, 155. Such a concept was even alleged by respondent Loew's by specific averment in its answer in the *Paramount* case.

The group of theaters, many times five in number, which combined through their common agent, Cooperative Theaters of Ohio, in licensing films plainly was a circuit within the meaning of the *Paramount* case. It was commonly referred to and recognized as such by distributor-defendants.

In *Paramount*, discriminatory practices condemned by the Court were found to violate the Federal Anti-Trust Act because they operated to prevent negotiation or bid-

ding for films "theater by theater" in competitive situations and therefore denied to an independent, small competitor an opportunity to obtain choice runs.

This Court used this language:

> "In the first place, they eliminate the possibility of bidding for films, theater by theater. In that way they eliminate the opportunity for the small competitor to obtain the choice first run, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. *In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theaters in closed towns with competitive situations.* The reasons have been stated in United States v. Griffith, and Schine Chain Theatres v. United States and need not be repeated here." (334 U. S. 131, 154, 155.)

In *United States v. Crescent Amusement Co.*, 323 U. S. 173, the action was against a group of nine companies operating motion picture theaters in some seventy small towns and three distributors.

The decision in that case establishes, in essence, that in dealing with an aggregation of theaters including within it a number of closed situations, which make for monopoly power, a distributor does not have the right to do whatever he pleases in the making of agreements; that in dealing with such a circuit he must give due regard to the competitive effect that those agreements will have upon the ability or inability of independent theaters operating in opposition to circuit theaters to show the distributor's films in competition with the circuit aggregation theater or at least upon the independent's ability or inability to negotiate for the licensing of his films in competition with the circuit theater.

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In *United States v. Griffith*, 334 U. S. 110, the Supreme Court passed on an appeal from the dismissal of the action by the District Court on the merits. The District Court had found that the appellees had not compelled or attempted to "compel distributors to grant them privileges not granted their competitors or which gave them any substantial advantage over their competitors" and had found further no such purpose as existed in the *Crescent* case, *supra*, to use buying power to eliminate competition. It found that the pooling of buying power was for the sole purpose of obtaining more favorable terms.

This Court, reversing the District Court, says:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement." (334 U. S. 100, 105.)

The Court further stated:

> "The anti-trust laws are as much violated by the prevention of competition as by its destruction. It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." (334 U. S. 100, 107.)

Referring to the lower court's finding that no specific intent or purpose to monopolize existed in the *Griffith* case, *supra*, the Supreme Court says:

> "A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses the strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade

weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. He need not be as crass as the exhibitors in United States v. Crescent Amusement Co., 323 U. S. 173, 89 L. Ed. 160, 65 S. Ct. 254, supra, in order to make his monopoly power effective in his competitive situations. *Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined.* When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.

"The consequences of such a use of monopoly power is that films *are licensed on a non-competitive basis in what would otherwise be competitive situations.* That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act. If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed." (334 U. S. 100, 107, 108.)

In *Schine Chain Theatres vs. United States,* 334 U. S. 110, the opinion recites:

"For the reasons stated in United States v. Griffith, the combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade

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and the use of monopoly power in violation of Section 1 and Section 2 of the Act." (334 U. S. 110, 116.)

The lower Court enjoined Schine from buying or booking product for theaters in which Schine has no financial interest. This was approved by the Supreme Court. And the final decree in the *Paramount* case enjoins each of the defendant-exhibitor affiliates of Warners, Fox and Loew's from

> "operating, booking or buying features for any of its theaters through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate." (C. C. H. Trade Reg. Rep. Par. 62,573.)

Even as the licensing in *Griffith*, despite absence of specific intent and despite the finding that the difficulties which beset the defendants' competitors there were the result of lawful competitive practices, was held tainted and in violation of the anti-trust laws because of the joinder in negotiations of open and closed situations, so, too, in the case at bar even were specific intent to restrain trade, build a monopoly and retain effective market control absent, yet the scheme of concurrent deal sheet negotiations for the open Regent situation and the other closed Cooperative situations, must have as a consequence the licensing of films on a non-competitive basis in what would otherwise be a competitive basis. In fact, as is conceded, the Moreland never was afforded the opportunity to compete with the Regent for the films of Fox, Universal and Warners and not until virtually 1947 was it afforded such an opportunity by Loew's.

The Trial Court viewed the use by Cooperative of its "admitted buying potential" to further the interest of its open situation as working a "detriment" upon the closed situation. Wherefore it was not likely that the closed

situation would tolerate such a use. Ergo "compelling logic," in the Trial Court's view, directly refuted the contention that "Mooney used his closed situations as a lever in negotiating for films for the Regent in preference over the Moreland."

The keystone of such a view is the assumption that refusal to buy product from a distributor for a monopoly, closed situation would work a detriment upon such situation. That is a fallacy. The monopoly, closed situation theater has a surplusage of product.

Therein lies the decisive difference between the monopoly, closed situation and the open situation. In the monopoly, closed situation, because there is adequacy of product, the exhibitor has an economic advantage over the distributor. In the competitive open situation, product in relation to outlets is in scarce supply and the distributor has an economic advantage over the exhibitor.

The buyer for the buying combine monopoly theater can find adequate product to substitute for the product which he refuses to buy for such theater from a particular distributor. He not only has a surplusage of product, but the need for quality of product is not so great in a monopoly, closed situation where there is no competition from another theater.

Each distributor is fully aware of the relative weakness of its economic position in the closed situation.

The technique of playing off one supplier against another with an eye to the securing of an advantage is not uncommon. The closed situation is made to order for the exercise of such a technique. No distributor would relish denial to it of the only available outlet for its product in a given area.

No detriment, therefore, in fact is visited upon the closed situations if the buyer for the buying combine sees

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fit to exercise his exclusive right to deal for closed situations in such a way that the distributor is impressed with the danger of losing its only outlet for exhibition in that area unless it hearkens unto the plain desire of such a potent buyer.

Distributor personnel who must deal with the problem of monopoly buying power at first hand did not contrive fine distinctions without differences. To them there wasn't a particle of difference between a Cooperative or a Mooney, possessed of a financial interest in the theaters for which he was buying and a Cooperative or a Mooney without such a financial interest. (R. I., pp. 63a, 69a, 105a, 184a.)

The price bargaining advantage inuring to the closed situation theater by membership in Cooperative is a very substantial one. Such a theater would not readily give up this advantage even if it were aware that it was being used to further the interests of the Cooperative theater in an open situation. Especially if such a use was by subtle and adroit devices successfully conducted without impact upon it. And Mooney permitted no Cooperative theater to know what product he was buying for another theater, or what he was paying for such product.

If, indeed, absent thread of common ownership, a buyer for a buying combine were not in a position to misuse buying power generated by its monopoly closed situation theaters, what reason could there possibly have been for the definition of a circuit as used in the *Paramount* case, to-wit, "a group of more than five theaters controlled by the same person or a group of more than five theaters which combine through a common agent in licensing films"? (*U. S. v. Paramount, et al.*, 334 U. S. 131, 155.)

What reason would there have been for the final decree in *Paramount* to enjoin exhibitor affiliates of Warners, Fox, and Loew's from buying features for any of their

theaters through "any agent who is known by it to be also acting in such manner for any other exhibitor * * *"? *U. S. v. Paramount*, 70 F. Supp. 53, 75.

What reason would there have been for similarly enjoining Schine, CCH Trade Cases 1948-49, Par. 62,447 p. 63,282, and Griffith respectively, from buying for any theater not owned by such circuits, as provided in the final decrees in each such case?

The answer is plain. A buying combine, even without a thread of common ownership, was recognized in *Paramount* as generating a potential for evil by concentration and centralization of large scale and monopoly buying power.

It is interesting to note, too, that in *Griffith* the trial court considered each of the four exhibitor respondents who bought through a common buying agent to be independent of each other, stating in its opinion:

> "The government contends that the four corporation defendants were combined into one circuit of theatres and refers to it as 'the Circuit.' The evidence does not so disclose. It does disclose that each corporate defendant owned and operated a distinct circuit or chain of theatres." 68 F. Supp. 180, 188.

Notwithstanding this finding, the Supreme Court in reversing the trial court's decision considered the total buying power generated through the common buying agent and held such agent's joinder of open and closed situations in negotiations for product, to be violative of the Act.

The only reported cooperative buying combine case we know of where there was an absence of common ownership of the theaters involved is *Midwest Theatres Co. v. Cooperative Theatres*, 43 F. Supp. 216. (E. D. Mich., 1941.) The court in that case recognized the product difficulties which confronted an independent theater in op-

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position to a theater in a cooperative buying combine. It observed that:

> "When left to his own resources an independent theater owner in competition with a Cooperative member, faces an almost insurmountable handicap." 43 F. Supp. 216, 220.

Nevertheless, at that time it was not prepared to hold the activities of such a combine illegal *per se* where it negotiated for both open and closed situations at the same time.

The *Midwest Theaters* case was decided before the Supreme Court decisions in *Crescent*, *Paramount*, *Schine*, and *Griffith*. It was urged upon the Supreme Court in *Griffith* as authority for the proposition that the use of a common agent was not illegal and that if the arrangement materially aided the Circuit in competition, it was not condemned by law. The plain inference was that the joinder of open and closed situations in the negotiations for product, therefore, was not illegal.

The trial court in *Griffith* had found that none of the distributor-defendants there was intimidated or coerced. That finding of fact was rejected by the Supreme Court because of the joinder of ope nd closed situations in negotiations for product.

Whether Cooperative's negotiations would be proper and legal if it negotiated separately for only its closed situations at one time and then negotiated for its open situations at a separate time is not here in issue. In the case at bar, Cooperative admittedly joined the open Regent situation and its many closed situations in lumped or simultaneous negotiations. In the light of *Crescent*, *Paramount*, *Schine*, and *Griffith*, that was illegal.

The District Court in this case found that petitioner did not suffer any damages as a result of any acts of the

respondents violative of the Anti-Trust Act. Such a finding is a necessary corollary to the Court's view that there was no violation of the Anti-Trust Act by respondents.

It is conceded that petitioner was deprived of product.

What the lower court found further, its opinion recites, is that such deprivation of product, i.e., such damage, was prompted "by considerations other than the monopolistic practices and the conspiracy" charged against the respondents (R. I, p. 160a).

If the lower court had concluded to the contrary, and had held that the deprivation of product was by reason of respondents' course of conduct or business arrangement violative of the Act,—it would follow necessarily that such deprivation had damaged the petitioner because deprivation of product does play a part in preventing the successful operation of a theater.

CONCLUSION.

The decision of the District Court is predicated on an interpretation of the Anti-Trust laws in conflict with the applicable decisions of the United States Supreme Court. Wherefore, your petitioner prays that this petition should be granted.

Respectfully submitted,

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APPENDIX A.

Judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

(Entered March 2, 1953 by Emerich B. Freed, Judge.)

Plaintiff's Amended and Supplemental Complaint is hereby dismissed at Plaintiff's costs, and judgment is hereby rendered for the defendants.

APPENDIX B.

Judgment of the United States Court of Appeals for the Sixth Circuit.

(Filed: November 16, 1954.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C.

Opinions Below.

(See Record Vol. I, pp. 143a and 190a.)

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APPENDIX D.

Opinion of the Court of Appeals for the Sixth Circuit.

(Filed November 16, 1954.)

Before ALLEN, MARTIN and MILLER, Circuit Judges.

PER CURIAM. The District Court dismissed the amended and supplemental complaint of appellant and entered judgment for appellees in this action for treble damages brought by appellant against the appellee motion picture distributors and exhibitors for alleged violation of sections 1, 2 and 7 of the Sherman Anti-trust Act, 15 U. S. C. A., section 1, et seq., and sections 4 and 16 of the Clayton Act, 15 U. S. C. A., sections 1, 2, 15 and 26.

We have thoughtfully considered the arguments advanced, the record in the case, the comprehensive and logically reasoned opinion of District Judge Freed (107 F. Supp. 453), together with his eighty-seven findings of fact, which are supported by substantial evidence and certainly are not clearly erroneous, and his seven conclusions of law, sustained by highest authority. Upon the basis of his opinion, findings and conclusions, we are of opinion that the judgment of the District Court should be affirmed, and that no worthwhile contribution would be made by this court by attempting to re-write in our own words the excellent opinion of the District Judge, who gave most conscientious study to the problems presented and has stated accurate conclusions.

The judgment of the District Court is affirmed.